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10  
11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA

13 RICHARD ROGERS, individually and  
14 on behalf of all others similarly situated,

Case No. 3:19-cv-5619

15 Plaintiff,

CLASS ACTION

16 v.

17 POSTMATES INC.,

**CLASS ACTION COMPLAINT**

18 Defendant.

19 Plaintiff Richard Rogers, individually and on behalf of all others similarly  
20 situated, complains and alleges as follows based on personal knowledge as to himself,  
21 the investigation of his counsel, and information and belief as to all other matters.  
22 Plaintiff believes that substantial evidentiary support will exist for the allegations set  
23 forth in this complaint, after a reasonable opportunity for discovery.

24  
25 **NATURE OF ACTION**

26 1. Plaintiff brings this Class Action Complaint for legal and equitable  
27 remedies resulting from the illegal actions of Postmates Inc. (“Postmates” or  
28 “Defendant”) in sending automated text message advertisements to his cellular

1 telephone and the cellular telephones of numerous other individuals across the  
 2 country, in clear violation of the Telephone Consumer Protection Act, 47 U.S.C.  
 3 § 227 (“TCPA”).

4 **JURISDICTION AND VENUE**

5 2. The Court has subject-matter jurisdiction over this action pursuant to 28  
 6 U.S.C. § 1331 and 47 U.S.C. § 227.

7 3. Personal jurisdiction and venue are proper in this District because  
 8 Defendant maintains its corporate headquarters within this District.

9 **PARTIES**

10 4. Plaintiff is an individual and a “person” as defined by 47 U.S.C. §  
 11 153(39). Plaintiff is, and at all times mentioned herein was, a resident of Pompano  
 12 Beach, Florida and a citizen of the State of Florida.

13 5. Defendant Postmates Inc. is a “person” as defined by 47 U.S.C. §  
 14 153(39). Defendant maintains, and at all times mentioned herein maintained, its  
 15 corporate headquarters in San Francisco, California. Defendant describes itself as a  
 16 company that “connects customers with local couriers who can deliver anything from  
 17 any store or restaurant in minutes.”<sup>1</sup>

18 **THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

19 6. In 1991, faced with a national outcry over the vast proliferation of  
 20 “robocalls” to the telephones of American consumers, Congress enacted the TCPA  
 21 to address certain abusive telemarketing practices. The TCPA prohibits any person  
 22 from, *inter alia*, using an “automatic telephone dialing system” (or “ATDS”), also

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23 <sup>1</sup> “About Postmates,” Postmates Inc., *available at* <https://postmates.com/about>  
 24 (last accessed July 25, 2019).

1 known as an “autodialer,” to make any call, including send any text message, to a  
2 wireless telephone number absent an emergency purpose or the “prior express  
3 consent” of the party called or texted. *See* 47 U.S.C. § 227(b)(1).

4 7. Unsolicited text messages have become especially problematic for  
5 consumers in recent years. As the Pew Research Center found, “[s]pam isn’t just for  
6 email anymore; it comes in the form of unwanted text messages of all kinds – from  
7 coupons to phishing schemes – sent directly to users’ cell phones.”

8 8. Companies today frequently blast consumers with text-message spam  
9 using “Short Message Services” (or “SMS”) technology, which allows for the rapid  
10 transmission and receipt of massive numbers of short messages to and from wireless  
11 telephones. Another technology known as “Multimedia Messaging Services” (or  
12 “MMS”) is similar to SMS but also permits the inclusion of photos, videos, and other  
13 audio-visual content within a text message.

14 9. Companies deliver SMS and MMS text messages directly to consumers’  
15 wireless devices by transmitting the messages to telephone numbers assigned to  
16 consumers’ devices. Because wireless telephones are carried on their owners’  
17 persons, SMS and MMS text messages are immediately received, virtually anywhere  
18 in the world, by the consumers to whom they are sent. When an SMS or MMS text  
19 message is successfully transmitted, the receiving device notifies its owner that he or  
20 she has received a new message by way of an auditory and/or visual alert.  
21 Consequently, unsolicited SMS and MMS text messages are distracting and  
22 aggravating to recipients and intrude upon their recipients’ seclusion on receipt.

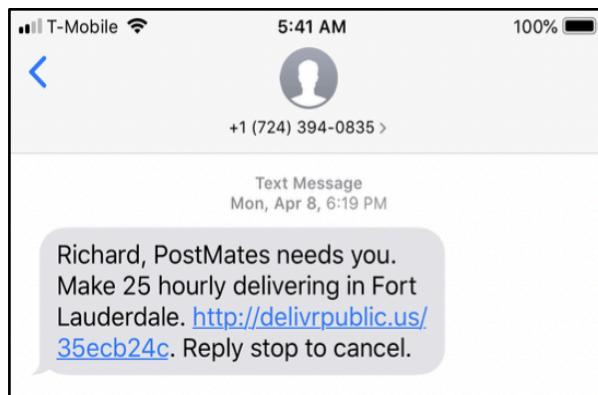
1       10. Text-message spam can also be costly to receive because consumers  
 2 typically either pay their wireless service providers in advance for the text messages  
 3 they receive or incur usage allocation deductions to their text messaging or data plans,  
 4 regardless of whether such messages are authorized.

5       **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

6       11. Plaintiff was at all times mentioned herein the subscriber of the cellular  
 7 telephone number (954) \*\*\*-3307 (the “3307 Number”). The 3307 Number was at  
 8 all times mentioned herein assigned to a cellular telephone service as specified in 47  
 9 U.S.C. § 227(b)(1)(A)(iii).

10       12. On or about April 8, 2019, Defendant transmitted or caused to be  
 11 transmitted, by itself or through an intermediary or intermediaries, an automated text  
 12 message offering its “gig economy,” courier-connection services to the 3307 Number  
 13 without Plaintiff’s prior express consent or prior express written consent, and without  
 14 providing Plaintiff a mechanism to stop receiving such messages in the future.

15       13. Specifically, on or about April 8, 2019, Defendant transmitted or caused  
 16 to be transmitted, by itself or through an intermediary or intermediaries, the following  
 17 automated text message advertisement to the 3307 Number without Plaintiff’s  
 18 express consent, written or otherwise:



1       14. The unsolicited text message advertisement depicted above was  
2 transmitted from the dedicated number (724) 394-0835, which upon information and  
3 belief is owned and operated by Defendant or Defendant's agent(s) or affiliate(s).

4       15. The unsolicited text message depicted above constituted "advertising" or  
5 "telemarketing" material within the meaning of the TCPA and its implementing  
6 regulations because the message promoted the commercial availability of  
7 Defendant's "gig economy"-oriented, courier-connections services, which are  
8 performed by "drivers" on an independent contractor basis. Defendant offered such  
9 services to Plaintiff to perform in the message depicted above for the purpose of  
10 deriving commercial profit from Plaintiff's performance of any such services in  
11 response to the message, in the form of service fees that Defendant's third-party  
12 clients pay for such services, substantial portions of which are retained by Defendant  
13 in the ordinary course of its business. In other words, the message depicted above  
14 was sent for the purpose, direct or indirect, of deriving commercial profit from any  
15 delivery services that Plaintiff subsequently provides to Defendant, and which  
16 Defendant in turn provides to its various third-party clients.

17       16. The 0835 number used by or on behalf of Defendant to transmit the  
18 offending text message to the 3307 Number is leased or owned by Defendant or  
19 another entity acting on its behalf and is used by or on behalf of Defendant to operate  
20 automated text message and marketing campaigns, and to transmit Defendant's  
21 automated text messages in connection with such campaigns, *en masse* and in an  
22 automated fashion without human intervention.

1       17. Because Plaintiff's cellular phone alerts him whenever he receives a text  
2 message, the unsolicited text message advertisement that Defendant sent to Plaintiff  
3 invaded Plaintiff's privacy and intruded upon Plaintiff's seclusion when he received  
4 it.

5       18. All telephone contact by Defendant or affiliates, subsidiaries, or agents  
6 of Defendant to Plaintiff at the 3307 Number occurred via an "automatic telephone  
7 dialing system" as defined by 47 U.S.C. § 227(b)(1)(A).

8       19. Specifically, the text message advertisements received by Plaintiff, and  
9 the other Class members, were sent from an automated dialing device that Defendant  
10 used to transmit messages to consumers *en masse* and includes features that make it  
11 capable of sending numerous text messages simultaneously and automatically to lists  
12 of telephone numbers without human intervention, and has the capacity to store,  
13 produce, and then dial such numbers automatically.

14       20. And the text messages at issue in this case were actually transmitted to  
15 Plaintiff and all other proposed members of the Class in an automated fashion and  
16 without human intervention, with hardware and software that stored, produced and  
17 dialed random or sequential numbers, and/or that received and stored lists of  
18 telephone numbers to be dialed and then dialed such numbers automatically and  
19 without human intervention.

20       21. Neither Plaintiff, nor the other members of the Class, provided their  
21 "prior express consent" or "prior express written consent" to Defendant or any  
22 affiliate, subsidiary, or agent of Defendant to transmit text message advertisements  
23 to the 3307 Number or to any other Class member's number by means of an  
24

1 “automatic telephone dialing system” within the meaning of 47 U.S.C.  
2 § 227(b)(1)(A)

3 22. None of Defendant’s text messages to the 3307 Number were sent for an  
4 emergency purpose.

5 23. Plaintiff does not have, and has never had, any sort of business  
6 relationship with Defendant or with any of Defendant’s agents or affiliates. At no  
7 time has Plaintiff ever provided the 3307 Number to Defendant or to any identified  
8 agent or affiliate of Defendant.

## 9 CLASS ALLEGATIONS

10 24. Class Definition. Plaintiff brings this civil class action on behalf of  
11 himself individually and on behalf of all other similarly situated persons as a class  
12 action pursuant to Federal Rule of Civil Procedure 23. The “Class” which Plaintiff  
13 seeks to represent is comprised of and defined as:

14 All persons in the United States who, at any time between  
15 September 6, 2015 and the present, received one or more text  
16 message(s) from Postmates, Inc. (or an affiliate, subsidiary,  
17 or agent of Postmates, Inc.) and for whom Postmates, Inc.  
18 does not have a record of the requisite consent to be sent such  
19 text messages.

20 25. Defendant, its employees, and agents are excluded from the Class.

21 26. Plaintiff reserves the right to modify the definition of the Class (or add  
22 one or more subclasses) after further discovery.

23 27. Plaintiff and all Class members have been impacted and harmed by the  
24 acts of Defendant or its affiliates or subsidiaries.

25 28. This Class Action Complaint seeks injunctive relief and monetary  
26 damages.

1       29. This action may properly be brought and maintained as a class action  
2 pursuant to Federal Rule of Civil Procedure 23(a) and (b). This class action satisfies  
3 the numerosity, typicality, adequacy, commonality, predominance, and superiority  
4 requirements.

5       30. On application by Plaintiff's counsel for class certification, Plaintiff may  
6 also seek certification of subclasses in the interests of manageability, justice, or  
7 judicial economy.

8       31. Numerosity. The number of persons within the Class is substantial,  
9 believed to amount to thousands of persons dispersed throughout the United States.  
10 It is, therefore, impractical to join each member of the Class as a named plaintiff.  
11 Further, the size and relatively modest value of the claims of the individual members  
12 of the Class renders joinder impractical. Accordingly, utilization of the class action  
13 mechanism is the most economically feasible means of determining and adjudicating  
14 the merits of this litigation.

15       32. Typicality. Plaintiff received at least one automated text message  
16 advertisements from Defendant without providing his "prior express consent" or  
17 "prior express written consent" to receive such messages from Defendant within the  
18 meaning of the TCPA. Consequently, the claims of Plaintiff are typical of the claims  
19 of the members of the Class, and Plaintiff's interests are consistent with and not  
20 antagonistic to those of the other Class members he seeks to represent. Plaintiff and  
21 all members of the Class have been impacted by, and face continuing harm arising  
22 out of, Defendant's violations or misconduct as alleged herein.

1       33. Adequacy. As Class representative, Plaintiff has no interests adverse to,  
2 or which conflict with, the interests of the absent members of the Class, and is able  
3 to fairly and adequately represent and protect the interests of such a Class. Plaintiff  
4 has raised viable statutory claims of the type reasonably expected to be raised by  
5 members of the Class and will vigorously pursue those claims. If necessary, Plaintiff  
6 may seek leave to amend this Class Action Complaint to add additional Class  
7 representatives or assert additional claims.

8       34. Competency of Class Counsel. Plaintiff has retained and is represented  
9 by experienced, qualified, and competent counsel committed to prosecuting this  
10 action. Plaintiff's counsel are experienced in handling complex class action claims,  
11 in particular claims brought under the TCPA and other consumer protection statutes.

12       35. Commonality and Predominance. There are well-defined common  
13 questions of fact and law that exist as to all members of the Class and predominate  
14 over any questions affecting only individual members of the Class. These common  
15 legal and factual questions, which do not vary from Class member to Class member  
16 and may be determined without reference to the individual circumstances of any  
17 Class member, include (but are not limited to) the following:

18       a) Whether Defendant or affiliates, subsidiaries, or agents of Defendant sent  
19                automated text messages to Plaintiff's and Class members' cellular  
20                telephones;

21       b) Whether such text messages were sent using an "automatic telephone  
22                dialing system";

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- 1       c) Whether the text messages sent constituted “advertisements” or
- 2           “telemarketing”;
- 3       d) Whether Defendant or affiliates, subsidiaries, or agents of Defendant can
- 4           meet their burden to show Defendant obtained “express consent” or
- 5           “prior express written consent” within the meaning of the TCPA to send
- 6           the text messages complained of, assuming such an affirmative defense
- 7           is raised; and
- 8       e) Whether Defendant or affiliates, subsidiaries, or agents of Defendant
- 9           should be enjoined from engaging in such conduct in the future.

10       36. Superiority. A class action is superior to other available methods for the  
11       fair and efficient adjudication of this controversy because individual litigation of the  
12       claims of all Class members is impracticable. Even if every member of the Class  
13       could afford to pursue individual litigation, the Court system could not. Individualized  
14       litigation would also present the potential for varying, inconsistent or  
15       contradictory judgments, and would magnify the delay and expense to all parties and  
16       to the court system by causing multiple trials of the same factual issues. By contrast,  
17       the maintenance of this action as a class action, with respect to some or all of the  
18       issues presented herein, presents few management difficulties, conserves the  
19       resources of the parties and the court system and protects the rights of each member  
20       of the Class. Plaintiff anticipates no difficulty in the management of this action as a  
21       class action. Class wide relief is essential to compel compliance with the TCPA. The  
22       interest of Class members in individually controlling the prosecution of separate  
23       claims is small because the statutory damages in an individual action for violation of  
24

1 the TCPA are small. Management of these claims is likely to present significantly  
2 fewer difficulties than are presented in many class actions because the text messages  
3 at issue are all automated and the Class members, by definition, did not provide the  
4 prior express written consent required under the statute to authorize such messages  
5 to be sent to their cellular telephones. The Class members can be readily located and  
6 notified of this class action through Defendant's records and, if necessary, the records  
7 of cellular telephone providers.

8 37. Additionally, the prosecution of separate actions by individual Class  
9 members would create a risk of multiple adjudications with respect to them that  
10 would, as a practical matter, be dispositive of the interests of other members of the  
11 Class who are not parties to such adjudications, thereby substantially impairing or  
12 impeding the ability of such nonparty Class members to protect their interests. The  
13 prosecution of individual actions by Class members could establish inconsistent  
14 results and/or establish incompatible standards of conduct for Defendant.

15 38. Defendant or any affiliates, subsidiaries, or agents of Defendant have  
16 acted on grounds generally applicable to the Class, thereby making final injunctive  
17 relief and corresponding declaratory relief with respect to the Class as a whole  
18 appropriate. Moreover, on information and belief, Plaintiff alleges that the TCPA  
19 violations complained of herein are substantially likely to continue in the future if an  
20 injunction is not entered.

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23  
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**CLAIM FOR RELIEF  
VIOLATION OF THE TELEPHONE  
CONSUMER PROTECTION ACT  
(47 U.S.C. § 227)**

39. Plaintiff incorporates by reference the foregoing paragraphs of this Class Action Complaint as if fully stated herein.

40. Plaintiff and each member of the Class received at least one text message from Defendant promoting and advertising the commercial availability of its “gig economy”-oriented courier services, which Defendant sought to enlist Plaintiff and the Class members to perform on its behalf for the purpose of deriving commercial profit in the form of service fees collected from Defendant’s third-party clients who use such services. Accordingly, each such text message constituted “advertising” or “telemarketing” material within the meaning of the TCPA and its implementing regulations.

41. Neither Plaintiff nor any other member of the Class provided Defendant prior express written consent (or prior express consent) to receive such text messages.

42. Defendant's unauthorized text messages were sent using an ATDS as evidenced by the generic nature of the text messages, the lack of any ability to stop the messages from continuing, the use of a dedicated long code, and the fact that Plaintiff had never provided his phone number to Defendant or any of its agents, affiliates, or subsidiaries and had no relationship with Defendant.

43. Defendant's use of an automatic telephone dialing system to transmit text messages advertisements to telephone numbers assigned to a cellular telephone service, including to Plaintiff's 3307 Number and the numbers of all members of the proposed Class, absent the requisite "prior express written consent" (or "prior express

1 consent”), as set forth above, constituted violations of the TCPA by Defendant,  
2 including but not limited to violations of 47 U.S.C. § 227(b)(1)(A)(iii).

3 44. As a result of Defendant’s violations of the TCPA, Plaintiff and all Class  
4 members are entitled to, and do seek, an award of \$500.00 in statutory damages for  
5 each violation of the TCPA (or \$1,500.00 for any such violations committed willfully  
6 or knowingly) pursuant to 47 U.S.C. § 227(b)(3).

7 45. Plaintiff and the other Class members seek an award of attorneys’ fees  
8 and costs.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff Richard Rogers prays for relief and judgment in favor  
11 of himself and the Class as follows:

12 A. Injunctive relief prohibiting such violations of the TCPA in the future;

13 B. As a result of each of Defendant’s violations of 47 U.S.C. § 227(b)(1),  
14 Plaintiff seeks for himself and each class member statutory damages of \$500.00 (or  
15 \$1,500.00 for any violations committed willfully or knowingly);

16 C. An award of attorneys’ fees and costs to counsel for Plaintiff and the  
17 Class; and

18 D. An Order certifying this action as a class action pursuant to Federal Rule  
19 of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court  
20 deems appropriate, finding that Plaintiff is a proper representative of the Class, and  
21 appointing the law firms representing Plaintiff as counsel for the Class.

1 **DEMAND FOR JURY TRIAL**

2 Plaintiff, on behalf of himself and the Class, hereby demands a trial by jury  
3 pursuant to Federal Rule of Civil Procedure 38(b) on all claims so triable.

4 Dated: September 6, 2019

**HEDIN HALL LLP**

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